



Virginia  
Regulatory  
Town Hall

## Proposed Regulation Agency Background Document

<b>Agency Name:</b>	DMHMRSAS
<b>VAC Chapter Number:</b>	12 VAC 35-115-10 et seq.
<b>Regulation Title:</b>	Rules and Regulations to Assure the Rights of Individuals Receiving Services from Providers of Mental Health, Mental Retardation and Substance Abuse Services.
<b>Action Title:</b>	Promulgate
<b>Date:</b>	2/1/2000

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

### Summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The proposed regulation will replace three separate regulations:

? Rules and Regulations to Assure the Rights of Residents of Facilities Operated by the Department of Mental Health, Mental Retardation and Substance Abuse Services (12 VAC 35-110-10 et seq.)

? Rules and Regulations to Assure the Rights of Patients of Psychiatric Hospitals and Other Psychiatric Facilities Licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services (12 VAC 35-120-10 et seq.)

? Rules and Regulations to Assure the Rights of Clients in Community Programs Licensed or Funded by the Department of Mental Health, Mental Retardation and Substance Abuse Services (12 VAC 35-130-10 et seq.)

The proposed regulation will protect the legal and human rights of individuals who receive treatment in programs and facilities operated, funded and licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services, excluding those operated by the Department of Corrections. To the extent that it is within the reasonable capabilities of the department or licensee, each individual is assured adequate care consistent with sound therapeutic treatment. The regulation will protect the rights of individuals with respect to the assurance of legal rights; evaluation, treatment, and discharge; treatment under the least restrictive conditions; participation in treatment decisions, research, and work activities; and disclosure of confidential information. The regulation also will delineate the process and remedies individuals can pursue to address violations of these rights.

### Basis

*Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.*

The proposed regulation is promulgated pursuant to §37.1-84.1 of the Code of Virginia (1950) as amended and Chapter 969 of the 1999 Virginia Acts of Assembly. This regulation is necessary to fulfill the department's legislative mandate pursuant to §37.1-84.1 to promulgate regulations delineating the rights of patients and residents with respect to nutritionally adequate diet; safe and sanitary housing; participation in non-therapeutic labor; attendance or nonattendance at religious services; participation in treatment decision-making, including due process procedures to be followed when a patient or resident may be unable to make an informed decision; use of telephones; suitable clothing; possession of money and valuables; and related matters. The Code also requires that such regulations be applicable to all hospitals and other programs and facilities operated, funded, or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services.

The Office of the Attorney General has certified that the Department of Mental Health, Mental Retardation and Substance Abuse Services has the statutory authority to

promulgate the proposed regulation and that the regulation comports with applicable state and/or federal law.

## Purpose

*Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.*

The Department of Mental Health, Mental Retardation and Substance Abuse Services is revising and consolidating the three sets of human rights regulations for the following reasons:

- ? To make the human rights regulation consistent for all facilities and programs licensed, funded and operated by the department,
- ? To incorporate changes in the law,
- ? To clarify and provide greater specificity of rights to consumers and families,
- ? To clarify the responsibilities of providers,
- ? To clarify the review and resolution process, and
- ? To provide timeframes for each stage of review.

Through these changes the consolidated revised regulation will improve the internal human rights system and the level of protection for the rights of clients of public and private facilities and programs operated, funded, and licensed by the department.

## Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.*

The proposed regulation consolidates and will supersede the three current regulations that were promulgated by the department to protect the legal and human rights of clients of public and private facilities and programs operated, funded, and licensed by the department. None of these three human rights regulations has been revised since 1983.

The organization of the proposed regulation has been completely revised to facilitate clarity. Each regulation now includes the following sections:

- ? individual right,
- ? provider duties, and
- ? exceptions and conditions.

The new substantive provisions of the regulation include:

- ? Clarification and definition of the composition, roles, and functions of the department's internal human rights system, the Local Human Rights Committees and the State Human Rights Committee.
- ? Provision for monitoring and enforcement of the regulation through sanctions for non-compliance.
- ? Establishment of time frames for the processing of complaints through the internal human rights system.
- ? Establishment of more stringent procedures for application, review and approval of variances from specific standards or procedures in the regulation.
- ? Establishment of reporting procedures for all programs and facilities operated, funded, and licensed by the department in specific areas.

Establishment of requirements and procedures for data submission and the release of data to the public on operations and performance of programs and facilities operated, funded or licensed by the department.

## Issues

*Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.*

The proposed regulation consolidates and will supersede the three regulations that were promulgated to protect the human rights of patients and residents of public and private facilities and programs operated, funded, and licensed by the department. None of the three existing regulations has been revised since 1983. Since 1983

numerous problems have been identified with the existing regulations. These problems include:

- ? Inconsistencies among the regulations for facilities operated by the department, licensed inpatient programs and community programs result in different levels of protection and confusion for consumers, families and providers;
- ? Changes in the law since 1983 are not reflected in the existing regulations;
- ? Changes in practice are not reflected in the existing regulations; and
- ? Time frames for the review/resolution of complaints are not specified in the existing regulations, resulting in protracted case reviews.

The advantages to the public, including consumers, families of consumers, and providers of mental health, mental retardation, and substance abuse services, are as follows:

- ? The regulation reflects current requirements of the law;
- ? The regulation reflects current practice;
- ? The regulation establishes a single set of standards that protect the rights of persons with mental disabilities who receive treatment in public and private facilities and programs operated, funded and licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services;
- ? The regulation reduces the burden of multiple regulations on public and private programs and facilities that provide inpatient and outpatient services;
- ? The regulation reduces the confusion for consumers and families, which often results when an individual moves from one type of program to another (e.g. inpatient to community program) each with a separate set of human rights regulations; and
- ? The regulation establishes reasonable time frames for the review and resolution of each complaint.

In 1992, the State Board of Mental Health, Mental Retardation and Substance Abuse Services adopted a resolution to consolidate the three existing regulations into a single regulation applicable to all facilities and programs operated, funded or licensed by the department. A 1996 comprehensive review of the existing human rights regulations and the public comment received during that review demonstrated extensive public

support for a single, consolidated regulation. There has been no show of support for maintaining the current regulations.

There are no disadvantages to the public or Commonwealth by the promulgation of this regulation.

### Fiscal Impact

*Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.*

There are no projected new or additional costs to implement the revised regulation beyond the ongoing expenditures for the Office of Human Rights. The budget for the Office of Human Rights is a part of the Administration and Support activity of DMHMRSAS (449-01). The total allocated to the office for the current fiscal year is \$1,620,923.

The agencies to be affected by this revised regulation include:

- ? 15 DMHMRSAS operated mental health and mental retardation facilities, and
- ? 390 licensed organizations; including CSBs, private psychiatric hospitals, and other providers. (These 390 licensed organizations provide over 1200 programs.)

### Detail of Changes

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.*

The proposed regulation consolidates and will supersede the three existing regulations that were promulgated by the department to protect the human rights of consumers of public and private facilities and programs operated, funded and licensed by the department. Specific changes to the proposed regulation include:

- ? Clearly defining the composition, role, and function of the internal human rights system, the local human rights committees, and the State Human Rights Committee. A

1999 revision to the Code of Virginia requires that one-third of the appointments made to the state or local human rights committees be consumers or family members of consumers, with at least two consumers who are receiving services on each committee.

? Requiring monitoring and evaluation of provider compliance with the regulation. A 1999 revision to the Code of Virginia requires that there be periodic reviews of human rights compliance. Licensing by DMHMRSAS will be contingent upon human rights compliance.

? Establishing procedures for enforcement and sanctions for violations of human rights. A 1999 revision to the Code of Virginia authorize sanctioning providers who fail to comply with human rights regulations.

? Establishing clearer procedures and time frames for the resolution process in the internal human rights system.

? Establishing more stringent procedures for the application, review and approval of variances from specific standards or procedures in the regulation.

? Establishing requirements for reporting, data submission and the release of data to the public. A 1999 revision to the Code of Virginia requires that all programs and facilities operated, funded and licensed report information on abuse and neglect, deaths and serious injuries, instances of seclusion and restraint, and other information on human rights activities.

? Prohibiting employees of programs and facilities operated, funded, or licensed by the department from serving as the authorized representative of a consumer in the program. A 1999 revision to the Code of Virginia prohibits this practice.

? Changing the format of the regulation to clarify individual rights, provider responsibilities, and exceptions.

? Simplifying the language of the regulation such that consumer, families and providers may more easily understand the regulation.

Updating the standards and terminology to reflect current practice.

## Alternatives

*Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.*

Several alternatives have been considered in developing regulations to protect the legal and human rights of consumers of services in facilities and programs operated, funded and licensed by DMHMRSAS. These alternatives include:

1. No regulation. This alternative was rejected. Repealing the existing human rights regulations without replacing them is in violation of §37.1-84.1 of the Code of Virginia, which requires the State Mental Health, Mental Retardation and Substance Abuse Services Board to promulgate regulations delineating the rights of patients and residents in all hospitals and other facilities and programs operated, funded or licensed by the Department of Mental Health, Mental Retardation and Substance Abuse Services.
2. No change to existing regulations. This alternative was rejected. None of the three existing regulations has been revised since 1983. Changes are needed in these regulations to address consumer and family concerns, inconsistencies in regulations for inpatient programs and community programs, and changes in current practice. This alternative is also not viable because of statutory changes in 1999.
3. Update the existing human rights regulations. This alternative was rejected. While the existing human rights regulations provide some assurances that the legal and human rights of consumers are protected, they differ in the level of protections provided, they are confusing to consumers and families, and they create an unnecessary burden for public and private providers who may be required to adhere to multiple regulations. In 1992, the State Board of Mental Health, Mental Retardation and Substance Abuse Services adopted a resolution to consolidate the three existing regulations into a single regulation applicable to all facilities and programs operated, funded or licensed by the department. A 1996 comprehensive review of the existing human rights regulations and the public comment received during that review demonstrated extensive public support for a single, consolidated regulation. There has been no show of support for maintaining the current regulations.
4. Repeal the existing human rights regulations and promulgate a single consolidated regulation. This alternative was chosen. Consolidation of the three human rights regulations into a single regulation will establish a single set of protections for the rights of persons with mental disabilities who receive services in facilities and programs operated, funded and licensed by the department regardless of the setting. This alternative is widely supported in the advocacy community and by public and private providers of mental health, mental retardation and substance abuse services.

### Public Comment

*Please summarize all public comment received during the NOIRA comment period and provide the agency response.*

There were no public comments during the NOIRA stage.

### Clarity of the Regulation

*Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.*

The Department of Mental Health, Mental Retardation and Substance Abuse Services has reviewed the regulation, held focus group sessions with public and private sector providers, advocates, and consumer and family representatives, and incorporated comments from earlier drafts to ensure that the regulation is clearly written and easily understandable by consumers, families of consumer and providers of services.

### Periodic Review

*Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.*

The Department of Mental Health, Mental Retardation and Substance Abuse Services will review and evaluate the need for amendments or revision to this regulation no later than July of 2003 and every three years thereafter.

### Family Impact Statement

*Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

This regulation explains the human rights of the individual as a recipient of services in a facility or program licensed, funded or operated by the Department. It will provide assurance to families that the human rights of their family members who are receiving mental health, mental retardation, and substance abuse services are protected and that there are procedural safeguards in place to address any violations to these rights. Such assurance is essential to the peace of

mind of many families who have entrusted the care and well-being on their children, parents, brothers, sisters, or other relatives to a service provider.

This regulation does not erode the authority and rights of parents in the education, nurturing and supervision of their children. It clearly speaks to the responsibilities of providers to obtain the consent of at least one parent of a minor before any treatment, including medical treatment, begins. It outlines provisions for an individual's next of kin to be designated as a legally authorized representative when an individual lacks the capacity to give consent for any treatment.

This regulation does not discourage the economic self-sufficiency, self-pride and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. In fact, the regulation is formatted to help individuals and family members understand their rights, procedural protections, and responsibilities by clearly describing each right, outlining the provider's duties, and listing any exceptions or conditions that may apply. This promotes the assumption of self-pride and responsibility by both the service recipient and his family members. This regulation has no effect on the marital commitment or on family income.